

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-210032

DATE: August 23, 1983

MATTER OF: Power Systems

DIGEST:

1. GAO will review affirmative determinations of responsibility where protester alleges that definitive responsibility criterion requiring a contractor to submit evidence of having specific experience in a particular area was not applied.
2. The protester has the burden of affirmatively proving its case. Where conflicting statements by the protester and contracting agency constitute the only available evidence, that burden has not been met.
3. Protest is sustained where the successful contractor did not submit evidence from which the contracting agency could reasonably conclude that definitive responsibility criterion had been met.

Power Systems (Power) protests the award of a contract to Williams & Lane, Inc. (W&L), under invitation for bids (IFB) No. N62472-82-B-1663 issued by the Naval Facilities Engineering Command (Navy). The IFB was for the acquisition of a powerplant to generate electricity. The protest centers on the Navy's determination that W&L is a responsible contractor and on the Navy's evaluation of transportation costs which resulted in W&L being found to have the lowest total cost.

The protest is sustained.

Our Office does not review affirmative determinations of responsibility unless there is either a showing of fraud on the part of procurement

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officials or an allegation that definitive criteria were not applied. American Sterilizer Company, B-207518, November 17, 1982, 82-2 CPD 453. The solicitation provision in question requires a contractor to submit evidence of having specific experience in a particular area and, thus, constitutes a definitive responsibility criterion. Delta Elevator Service Corporation, B-208252, March 23, 1983, 83-1 CPD 299. Since the protester has alleged that the procuring agency did not apply a definitive responsibility criterion, we will consider this aspect of the protest.

In this regard, Power raises two questions. The first pertains to paragraph D(4) of the solicitation's experience clause, which states the following:

"D. In determining operational experience, the following will apply to the diesel engines including the speed governing system:

* * * * *

"(4) Only experience at the same or higher brake mean effective pressure as that which is offered is acceptable."

Power contends that the 20-cylinder engines which W&L has cited for experience have a brake mean effective pressure (BMEP) of 123 psi and the 16-cylinder engines which W&L has offered in its bid have a BMEP of 131 psi. Power maintains that W&L has not met paragraph D(4) since the 20-cylinder engines did not have "the same or higher" BMEP as the 16-cylinder engines.

The Navy acknowledges that W&L has cited 20-cylinder engines for experience and has offered 16-cylinder engines in its bid. The Navy argues, however, that both engines have an identical BMEP of 131 psi. Since paragraph 3.9.1 of the technical specifications provides that the maximum permitted BMEP is 135 psi, the Navy maintains that the engine offered and experience cited are acceptable.

The protester has the burden of affirmatively proving its case; where conflicting statements by the protester and

the contracting agency constitute the only available evidence, as in the present case, that burden has not been met. Electronic Data Systems Federal Corporation, B-207311, March 16, 1983, 83-1 CPD 264. Power has offered no direct evidence that the 20-cylinder engine which W&L cited for experience has a BMEP of 123 psi.

The second question raised by Power pertains to the following paragraphs of the experience clause:

"B. Power plant components identical to those to be described in the bid must have performed successfully in not less than three separate installations for not less than 6000 hours in each installation during a period of not more than three years. Specific components which shall meet this requirement are the diesel engine including its speed governing system.

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"D. In determining operational experience, the following will apply to the diesel engines including the speed governing system:

* * * * *

"(3) Only experience on the same engine model is acceptable. Engine model is considered to be a given series or class of identical bore, stroke, rotative speed and method of aspiration." (Emphasis added.)

Power interprets this language to mean that a bidder may only cite experience on the same engine as that which is offered in its bid. Power argues that W&L has not met this requirement by citing experience on 20-cylinder engines in support of its offer of 16-cylinder engines. Power claims its bid price, only \$8,906 higher than W&L's, would have been substantially lower had it known it could cite experience on a different engine than that offered. Power states it would have offered a 16-cylinder rather than 20-cylinder engine it bid to meet the experience requirement.

The Navy argues that W&L has met the experience clause since the solicitation language only requires the bidder to

demonstrate experience with an electric governor and not with a particular type of engine. Since W&L cited adequate experience with an electric governor, the Navy claims it is immaterial whether W&L operated the governor on 20-cylinder engines or 16-cylinder engines since experience with electric governors (as a component) is what was relevant, and such experience need not be associated with a particular type of engine.

Our review of the contracting agency's affirmative determination is limited to determining whether W&L has submitted evidence from which the agency could reasonably conclude that the definitive responsibility criterion had been met. Watch Security, Inc., B-209149, October 20, 1982, 82-2 CPD 353. We do not believe the Navy had a reasonable basis to conclude that W&L has met the solicitation's experience clause.

The clause explicitly states that a bidder's experience with powerplant components shall be identical to those described in its bid. The Navy interprets the word "component" to mean the individual mechanical parts of an engine, such as an electric governor, and not the engine itself. This interpretation, however, runs counter to the plain language of the experience clause. Paragraph "B" states that the specific components which must satisfy the experience requirements "are the diesel engine including its speed governing system," and paragraph "D" states that certain experience requirements will be applied "to the diesel engine including the speed governing system." Further, the language of paragraph D(3) of the experience clause states that in determining a bidder's operational experience, "only experience on the same engine model is acceptable." (Emphasis added.) The paragraph defines "same engine model" as a "given series or class of identical bore, stroke, rotative speed, and method of aspiration." In our view, a 16-cylinder engine and a 20-cylinder engine do not constitute the "same engine model."

Thus, contrary to the Navy's contention, the word "component" is used in the solicitation to refer to mechanical parts of a powerplant, such as an engine, and not to mechanical parts of an engine, such as a governor. Consequently, the language of the solicitation requires a bidder to demonstrate operational experience on a powerplant

component identical to that which is described in its bid. Since W&L had offered to sell the Navy 16-cylinder engines, but has only cited operational experience on 20-cylinder engines, the procuring official could not have reasonably concluded that the definitive responsibility criteria of the experience clause had been met.

Therefore, we sustain the protest because we find that W&L had not submitted evidence from which the Navy could reasonably conclude that W&L satisfied the definitive requirements of the solicitation's experience clause.

In view of our decision to sustain the protest on the basis of Power's allegation with regard to the responsibility determination, we need not reach the question of transportation costs. However, we note that the Navy appears to have properly calculated transportation costs on the basis of the lowest published rates on file with the Military Traffic Management Command at the time of bid opening. Wilson & Hayes, Inc., B-206286, February 28, 1983, 83-1 CPD 191.

In determining whether it is in the Government's best interest to recommend action which may result in the termination of an improper award, we consider factors such as the seriousness of the procurement deficiency, the degree of prejudice to other offerors or to the integrity of the competitive procurement system, and the extent of performance and the cost to the Government. Dillon Supply Company; Department of Energy--Request for Reconsideration, B-203937, January 19, 1982, 82-1 CPD 41. We have held that remedial relief is not practical where a contract has been substantially performed, see Propper Manufacturing Co., Inc., B-208035, March 22, 1983, 83-1 CPD 279, and where only several months remain before scheduled delivery under the awarded contract, see Williams & Lane, Inc., B-203233, January 8, 1982, 82-1 CPD 21.

We are advised in the instant case that W&L has substantially performed the contract, and that termination costs would be in excess of \$1 million. Thus, as a practical matter, corrective action is foreclosed. However, by separate letter of today, we are advising the Navy of the deficiency in this procurement.

for *Harry R. Van Cleave*
Comptroller General
of the United States